

# ARKANSAS SUPREME COURT

No. CR 88-05

MILTON JONES  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered February 7, 2008

PRO SE PETITION FOR LEAVE TO  
REINVEST JURISDICTION IN THE  
TRIAL COURT TO CONSIDER A  
PETITION FOR WRIT OF ERROR  
CORAM NOBIS [CIRCUIT COURT OF  
JEFFERSON COUNTY, CR 86-396]

PETITION DENIED.

## PER CURIAM

In 1987, a jury found petitioner Milton Jones guilty of capital murder and sentenced him to imprisonment for life without parole. This court affirmed the judgment. *Jones v. State*, 296 Ark. 135, 752 S.W.2d 274 (1988). Petitioner now brings this pro se petition in which he requests permission to proceed in the trial court with a petition for writ of error coram nobis.<sup>1</sup> After a judgment has been affirmed on appeal, a petition filed in this court for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis only after we grant permission. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

For the writ to issue following the affirmance of a conviction, the petitioner must show a fundamental error of fact extrinsic to the record. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997). The writ is allowed only under compelling circumstances to achieve justice and to address

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<sup>1</sup>For clerical purposes, the instant motion was assigned the same docket number as the direct appeal.

errors of the most fundamental nature. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam). We have held that a writ of error coram nobis was available to address certain errors that are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Id.* at 583, 986 S.W.2d at 409.

In the petition before us, petitioner contends that the prosecution withheld evidence that could have been used for impeachment purposes and would have prevented admission of petitioner's confession. Petitioner does not clearly state what particular evidence he claims was withheld, but it is clear that this evidence related to statements by petitioner's girlfriend's mother and a codefendant to the murder charge, Roosevelt Ferguson, concerning the reason for petitioner's leaving Pine Bluff to travel to Kansas City.

The petition references an affidavit by Mr. Ferguson and includes, as attachments, an affidavit by petitioner's girlfriend and a copy of this court's opinion in Mr. Ferguson's direct appeal, *Ferguson v. State*, 298 Ark. 600, 769 S.W.2d 418 (1989), which contains a reference to a statement by Mr. Ferguson. Petitioner does not provide a statement from either Mr. Ferguson or the girlfriend's mother. Petitioner asserts that, in his affidavit, Mr. Ferguson admitted that he set the petitioner up for the murder and provided the police with details of the trip to Kansas City. Petitioner's girlfriend states in her affidavit that her mother did speak to the police, but did not provide any information about Kansas City. The State appears to construe the allegations in the petition as a claim that statements by the mother and Mr. Ferguson were the evidence withheld, but contends petitioner failed to state facts in support of that claim.

If sufficiently stated, petitioner's claim would fall within the third category of error recognized

as a basis for the writ, because he asserts constitutional violations of his right to due process as guaranteed by *Brady v. Maryland*, 373 U.S. 83 (1963). There are three elements of a *Brady* violation, as follows: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; (3) prejudice must have ensued. *Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000). In determining whether a petition for writ of error coram nobis that makes such a claim may be granted, we determine whether there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the claimed exculpatory evidence been disclosed at trial. *See Larimore*, 341 Ark. at 408, 17 S.W.3d at 94.

Petitioner was tried prior to Mr. Ferguson's arrest. If Mr. Ferguson's affidavit was sworn after his arrest in 1988, it would not have been available for the prosecution to provide to petitioner's defense, and could not have been suppressed. Even assuming that the police had similar statements made by Mr. Ferguson prior to his arrest and available prior to petitioner's trial, we cannot say that petitioner has shown a reasonable probability that the judgment of conviction would not have been rendered.

Petitioner asserts that there is a reasonable probability that his confession would not have been deemed admissible if the statements had been made available to the defense. He apparently contends that the statements could have been used to impeach statements by the police concerning the lack of coercion in obtaining his confession.<sup>2</sup> But, there was no statement by the officers during the

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<sup>2</sup> To the extent that petitioner would raise direct claims that the statement was coerced or that the evidence against him was not sufficient, those claims are not cognizable. A claim is not cognizable in a petition for writ of error coram nobis if it may be properly raised in a timely

suppression hearing that would have been impeached by the statements petitioner claims his girlfriend's mother and Mr. Ferguson made.

During the trial, petitioner's defense was that Mr. Ferguson had set him up, and the officers were questioned by the defense at that time concerning the reasons behind their trip to Kansas City. In his trial testimony, one of the officers indicated petitioner's girlfriend's mother had suggested petitioner might be in Kansas City. While petitioner claims this statement could have been impeached with information that was withheld, the reference does not appear to have any relevance to the admission of his confession, and the value of any impeachment of the officers, so far as petitioner contends that would have been possible, is not sufficient to provide a reasonable probability that the judgment would not have been rendered in light of petitioner's confession and the other strong evidence presented at trial.

Moreover, petitioner has not acted with due diligence in seeking error coram nobis relief. There is no specific time limit for seeking a writ of error coram nobis, but due diligence is required in making an application for relief and in the absence of a valid excuse for delay, the petition will be denied. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005). Due diligence requires that: (1) the defendant be unaware of the fact at the time of trial; (2) the defendant could not have, in the exercise of due diligence, presented the fact at trial; (3) upon discovering the fact, the defendant did not delay bringing the petition. *Id.*

Petitioner contends he only recently became aware of the statements after encountering Mr. Ferguson in prison. Apparently, his discussion with Mr. Ferguson prompted further investigation on

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petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 or on direct appeal. *See McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam).

his part that he alleges led to his discovery of the existence of the statements. But, with the exercise of due diligence, the girlfriend's mother's statement could have been presented at petitioner's trial, and petitioner could have discovered Mr. Ferguson's affidavit within a short time after the trial.

Petitioner's defense, as previously noted, was premised upon his claim that Mr. Ferguson had set him up to take the blame for the murder. Petitioner made statements during the suppression hearing that indicated he believed Mr. Ferguson was in contact with the police prior to petitioner's arrest and one of the police officers testified at trial that he had obtained information from petitioner's girlfriend's mother. Petitioner does not assert that his girlfriend and her mother were not available to interview prior to the trial. Mr. Ferguson was arrested in 1988 and could have been interviewed at any time afterwards.

Our opinion on Mr. Ferguson's direct appeal, with its reference to Mr. Ferguson's statements, was available in 1989. The fact that petitioner was only motivated to make additional inquiry after speaking to Mr. Ferguson in a chance encounter is not a valid excuse for a delay of more than eighteen years after that information was published before raising these issues in an error coram nobis proceeding.

Because petitioner has not presented a claim sufficient to show a reasonable probability that the judgment would not have been rendered and has failed to exercise due diligence in bringing his claims, he has failed to provide grounds to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis. We therefore deny the petition.

Petition denied.